

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

BB
76-1080

for the People
Lawrence Jason

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1080



UNITED STATES OF AMERICA, Plaintiff-Appellee,

—v.—

ALLAN B. DOUGLASS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

■ BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Allan B. Douglass appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on January 21, 1976 after a four-day trial before the Honorable Whitman Knapp, United States District Judge, and a jury.

Indictment 75 Cr. 294, filed March 19, 1975, charged Douglas in nine counts with unlawfully and corruptly accepting money in connection with his duties as an employee of the United States Bureau of Prisons, in violation of Title 18, United States Code, Section 201(c).*

* Indictment 75 Cr. 294 superseded Indictment 75 Cr. 272, which had been filed on March 17, 1975. Indictment 75 Cr. 294 simply corrected various typographical and clerical errors contained in 75 Cr. 272. In addition to Douglass, there were five other defendants named in both indictments. There was no conspiracy count, and the other defendants were severed before the trial of Douglass.

Trial against Douglass commenced on December 2, 1975 and concluded on December 5, 1975, when the jury found Douglass guilty on Counts Four and Five and not guilty on Counts One through Three and Six through Nine. On January 21, 1976 Judge Knapp sentenced Douglass to concurrent terms of two years' imprisonment on each of Counts Four and Five, which Douglass is now serving.*

Statement of Facts

The Government's Case

A. Summary

The evidence demonstrated overwhelmingly that, while the defendant Douglass was employed as a corrections counselor at a halfway house for federal prisoners, he accepted bribes from inmates in return for permitting the inmates to remain outside of the halfway house for longer periods than allowed.

B. The Bribes Begin

Douglass worked at the Federal Community Treatment Center located in the Woodward Hotel on 55th Street in New York, New York. The Community Treatment Center, or halfway house, is designed for federal prisoners who are serving the final three or four months of their sentences. Inmates at the halfway house are encouraged to work outside the house during the day, but they are required to sleep at the house at night. Generally the inmates, called residents, were required to be

* Douglass has filed a Motion to Reduce Sentence under Rule 35 of the Federal Rules of Criminal Procedure. This Motion is now pending before Judge Knapp.

at the halfway house at least six hours a day, except on weekends. (Tr. 25-29, 41).* Douglass worked the 4 p.m. to midnight shift.

Peter LaFroscia, who had been convicted in 1973 of smuggling hashish, was transferred to the halfway house at the Woodward Hotel on about December 20, 1974, where he remained until March 1975. Throughout this period, Douglass was in charge of the halfway house during his shift. (Tr. 115-22). Some time during the first week of January 1975 LaFroscia told Douglass he "was having a hard time getting to and from the halfway house", asked whether anything "could be done", and placed an envelope containing \$50 on Douglass' desk. Douglass picked up the envelope and said he would see what could be done. (Tr. 123-24). When LaFroscia signed in at the halfway house the following evening, Douglass told LaFroscia he could sign out, though previously Douglass had always been required to stay at the halfway house at least six hours before he could again sign out. Douglass initialed the book and LaFroscia went home. After this incident, LaFroscia regularly signed in and signed out at the same time and then went home. The only occasions when LaFroscia stayed the required six hours at the halfway house were when Douglass was not on duty. (Tr. 125-27).

Approximately two weeks after giving Douglass the first \$50 bribe, LaFroscia gave Douglass \$10. The following week LaFroscia again gave Douglass \$10. Approximately two weeks later LaFroscia still again gave Douglass \$10. On February 27 or 28, 1975 LaFroscia gave Douglass \$5. (Tr. 128-30).**

* "Tr." refers to the trial transcript; and "GX" to Government Exhibits.

** These payments corresponded to Counts Five through Nine of the Indictment. Of these, Douglass was found guilty on Count Five.

C. Bribes Douglass Accepted From Hardy

On approximately December 18, 1974, Michael Hardy moved into the halfway house at the Woodward Hotel. He had previously been serving a sentence at the Federal Penitentiary at Danbury, Connecticut for conspiring to transport stolen motor vehicles in interstate commerce. When Hardy arrived at the halfway house, he met the defendant Douglass. (Tr. 178-82).

After a meeting on January 17, 1975 with members of the First Deputy Commissioner's Special Force of the New York City Police Department and with agents of the Federal Bureau of Investigation, Hardy began cooperating in an investigation into corruption at the Woodward Hotel halfway house. (Tr. 187-88). In connection with that investigation, Hardy had a telephone conversation with LaFoscia in which LaFoscia told Hardy that LaFoscia had paid Douglass \$50 initially and then paid Douglass on a weekly basis so that he would not be required to stay at the halfway house. This conversation was recorded with Hardy's permission by members of the First Deputy Commissioner's Special Force and by FBI agents. (Tr. 130, 152-54, 188-90; GXs 14, 14A).

On the night following his conversation with LaFoscia, Hardy went to the Woodward Hotel and had a conversation with Douglass.* Hardy told Douglass he wanted to "get on the program" and that he was "making enough money to afford it." Douglass replied that he could not "give away nights anymore," because the new boss was "pretty strict." Douglass explained that he

* This conversation was recorded under the supervision of the FBI and the New York City Police Department by equipment Hardy was wearing on his person. Hardy's later conversations with Douglass also were recorded.

could cover for Hardy if he had a night job. During this conversation Hardy held \$50 in his hand, but placed it back in his pocket at the conclusion of the conversation. (Tr. 200-07; GXs 8, 8A).

Hardy met with Douglass at the halfway house again on February 3, 1975. Hardy told Douglass he did not want to sign in and said he wanted to give Douglass \$50 and then \$30 a week. Douglass said "there's no such thing as not coming in here." Then Douglass explained that "the boss is breathing down our necks here and what has gone on in the past is ancient history . . ." When Hardy again offered him \$50, Douglass pushed it away, saying "money is money" and "if I didn't take it . . . there must be reasons." At the end of the conversation, Douglass said he could give Hardy a pass to stay out on Sunday night as well as Friday and Saturday nights. (Tr. 209-18; GXs 9, 9A).

Hardy next spoke to Douglass on February 6, 1975. Douglass again gave Hardy a weekend pass that included Sunday night. Hardy gave Douglass \$10 for the pass. Douglass placed the \$10 in his pocket. (Tr. 218-23; GXs 10, 10A).*

On February 13, 1975 Hardy had another conversation with Douglass. The night before the 13th a substitute guard, who had replaced the guard who had the shift following Douglass, had reported that Hardy and six other inmates were not in their room. In their conversation on the 13th, Douglass told Hardy that restrictions had to be imposed on Hardy, because the substitute guard had reported his absence. Hardy told Douglass that he

* On the tape recording of this conversation, Hardy can be heard saying "let me give you ten for the pass . . ." Douglass' response is not audible. (GXs 10, 10A).

understood that Douglass had spoken to Douglass' boss on behalf of Hardy. Hardy thanked Douglass and said he wanted to give Douglass \$50. Douglass said he could not do anything else for Hardy and that "I'd rather not take this, Hardy." Hardy placed the \$50 on the desk in front of Douglass, who put the money in his pocket. (Tr. 251-56, GXs 11, 11A).

On February 25th, Hardy and Douglass again spoke together. Douglass referred to a note he had left for Hardy and warned him that Douglass' superior was upset when he had seen that Hardy had been signing in late. After Douglass repeated his warning that Hardy must take care to avoid any more problems, Hardy expressed his appreciation and handed Douglass \$25, which Douglass accepted. (Tr. 264-67; GXs 12, 12A).

Hardy's final payment to Douglass was \$25 on Thursday, February 27th. At the beginning of the brief conversation between the two men that ensued that evening, Douglass said he would let Hardy go out on his weekend pass that night. Hardy expressed his appreciation and handed Douglass \$25, which Douglass put in his pocket. (Tr. 269-71; GXs 13, 13A). When Douglass was arrested shortly after midnight on February 28th, he had \$25 in his possession. The serial numbers on those bills matched the numbers of the bills that had been provided by police officers to Hardy earlier that evening. (Tr. 354-56; GXs 20, 21, 22, 23).*

The Defense Case

The defendant neither testified nor offered any other evidence.

* This last bribe by Hardy resulted in Douglass' conviction on Count Four. Douglass was acquitted of accepting the earlier bribes from Hardy.

ARGUMENT

POINT I

The evidence that Douglass received the bribe charged in Count Four intending to be influenced in his official duties was more than sufficient.

Douglass argues that there was insufficient evidence that he accepted the \$25 bribe charged in Count Four intending to be influenced in the performance of his duties. Rather, Douglass argues, the evidence, at best, showed only that he accepted a gratuity for acts he had previously performed. This claim is meritless.

The evidence supporting Douglass' conviction on Count Four,* taken in the light most favorable to the Government, as it must be once a jury has returned a verdict of guilty, see *United States v. Lubrano*, 529 F.2d 633, 635 (2d Cir. 1975), *United States v. Goldberg*, 527 F.2d 165, 168 (2d Cir. 1975), cert. denied *sub nom. Pocono International Corp. v. United States*, 44 U.S.L.W. 3659 (May 18, 1976); *United States v. McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), can be summarized as

* Count Four of the indictment charged that Douglass accepted the \$25 bribe:

"in return for (a) being influenced in his performance of official acts, (b) being influenced to commit and aid in committing, and to collude in, and allow, a fraud, and make opportunity for the commission of a fraud, on the United States, and (c) being induced to do and omit to do acts in violation of his official duties, to wit, in return for permitting certain federal prisoners confined at the Woodward FCTC to be absent from the Woodward FCTC at and during certain times when their presence therein was required by regulations of the United States Bureau of Prisons"

follows: On Thursday, February 27, 1975, Hardy returned from outside the halfway house and had a discussion with Douglass. The conversation began with Douglass informing Hardy that he could leave immediately that Thursday night for the weekend. At the conclusion of the conversation, which was recorded, Hardy handed \$25 to Douglass and said, "here Mr. Douglass, that's twenty-five. I really appreciate it, thank you very much for last night also." Douglass' response then clearly tied the money he was receiving to the weekend pass: "Okay so, er, I'll see you Sunday night Hardy. Don't be late or anything." (GXs 13, 13A).

This evidence alone—particularly the fact that the bribe was paid contemporaneously with Douglass' agreement to let Hardy out for an extended weekend—was more than sufficient to lead the jury to conclude that Douglass accepted the \$25 bribe in return for being influenced in his official duties. But while this evidence in and of itself was more than sufficient to satisfy the jury that Douglass did not believe he was simply accepting a gift in return for past favors, there was additional proof which showed conclusively that this payment was received to influence either Douglass' present or future official conduct.

On January 21, 1975, when Hardy told Douglass that he was willing to pay to "get on the program," Douglass showed he knew what Hardy meant when Douglass replied that he could not "give any nights away anymore" because the new boss was "pretty strict." Douglass did not accept the \$50 Hardy held in his hand that night, nor did Douglass accept the \$50 Hardy offered him on February 3rd. (Tr. 200-18; GXs 8, 8A, 9, 9A). However, on Thursday, February 6th, Douglass gave Hardy a weekend pass and Hardy immediately gave money to Douglass saying "let me give you ten for the pass . . ." Douglass accepted the money. (Tr. 218-23; GXs 10, 10A).

This pattern whereby Douglass accepted money from Hardy in exchange for relaxing and abrogating rules is further illustrated by the events on February 13th and 25th. On February 12th a substitute guard had reported that Hardy had failed to return to the halfway house. Hardy thanked Douglass on February 13th for speaking on Hardy's behalf to Walsh, the head of the halfway house, and then handed Douglass \$50. (Tr. 251-56; GXs 11, 11A). When Hardy came in to the halfway house on February 25th, Douglass said he had left a note for Hardy and warned him that Douglass' superior had become upset when he saw that Hardy had been signing in late. Douglass repeated his warning that Hardy must avoid any new problems. Hardy thanked Douglass and gave him \$25. (Tr. 264-67; GXs 12, 12A).*

In light of this evidence showing a clear pattern of conduct in which Douglass took money from Hardy, as well as LaFroscia, in exchange for assisting them in their efforts to remain away from the halfway house when the rules required their presence, the jury could certainly have found that Douglass fully anticipated that his offer to Hardy of an extended weekend pass would result in a payment of money. Alternately, the jury could well have found that the \$25 bribe was not only a payment for the pass then being offered, but also an inducement for favors to be offered by Douglass in the future.

* Despite Douglass' claims to the contrary, this Court, in assessing the sufficiency of the Government's proof, may, of course, rely on evidence adduced with respect to Counts for which the jury had a reasonable doubt and acquitted. See *United States v. Lubrano*, 529 F.2d 633, 636 n. 1 (2d Cir. 1975); *United States v. Finkelstein*, 526 F.2d 517, 527 (2d Cir. 1975); *United States v. Sisca*, 503 F.2d 1337, 1344 n.9 (2d Cir.), cert. denied, 419 U.S. 1008 (1974).

In short, this was not a case where, based on the evidence, the jury could only have found that Douglass had received a gift which neither influenced his present nor future conduct. Indeed, with the evidence such as it was, it is difficult to imagine the jury arriving at any conclusion other than that Douglass received this money intending to be influenced in the performance of his official duties. Defendant's attack on the sufficiency of the evidence amounts to nothing more than an attempt to lure this Court into sitting as a "super jury" to which counsel seeks to address an appellate summation. This Court has repeatedly declined to assume the role which Douglass seeks to have it fill. *E.g., United States v. Kahaner*, 317 F.2d 459, 467-68 (2d Cir.), cert. denied as *Corallo v. United States*, 375 U.S. 835 (1963).

POINT II

The instructions given to the jury by the District Court were entirely proper.

Douglass appears also to claim that the District Court erred when did not instruct the jury on Count Four as to the lesser offense of accepting an unlawful gratuity in violation of 18 U.S.C. § 201(f). As a part of this argument, Douglass claims that "defendant's counsel fully expected under his view of the statute that the court would charge an unlawful gratuities (367, 372)." (Br. at 28). This is an unfortunate distortion of the record.

The Government submitted to the trial judge a written request to charge that the jury could find the defendant guilty of accepting an unlawful gratuity, together with a memorandum arguing that the evidence supported a gratuity instruction. Counsel for the defendant submitted no written requests to charge, but vigorously

opposed the Government's request to give instruction on the unlawful gratuity alternative. (Tr. 245-51). Defense counsel's failure to ask the trial court to charge the jury on the unlawful gratuity theory—and indeed his vigorous opposition to such an instruction—totally belies his claim that he expected such an instruction to be given and is a complete bar to Douglass' claim on appeal that the failure to deliver this instruction was error. See *United States v. Santiago*, 528 F.2d 1130, 1135 (2d Cir. 1976); *United States v. Goldberg*, 527 F.2d 165, 173 (2d Cir. 1975), cert. denied, *sub nom. Pocono International Corp. v. United States*, 44 U.S.L.W. 3659 (May 18, 1976); *United States v. Pinto*, 503 F.2d 718, 723 (2d Cir. 1974); *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U.S. 907 (1966); *United States v. Kahaner*, 317 F.2d 459, 475 (2d Cir.), cert. denied, as *Corallo v. United States*, 375 U.S. 835 (1963); Fed. R. Crim. P. 30.*

If in reply to the Government's arguments Douglass were to claim that, although he opposed giving the gratuity instruction as to all counts, it should have been given as to Count Four, the answer is simply that he never requested the trial court to take that action. Nor can Douglass argue that the trial court committed plain error when it submitted the case, as Douglass requested, solely on the bribery theory. Douglass argued to the jury, as he argues now, that there was no evidence of improper

* Douglass' reliance on *United States v. Harary*, 457 F.2d 471 (2d Cir. 1972), is entirely misplaced. This Court reversed Harary's conviction because the District Court instructed the jury on the gratuity theory over the opposition of the defendant who admitted paying the bribe but claimed he had been entrapped. Under the circumstances, Harary was either guilty or not guilty of bribery, but there was no evidence to support a verdict of not guilty of bribery and guilty of paying an unlawful gratuity. Douglass, like Harary, opposed the gratuity instruction and cannot now claim the Court should have ignored *Harary* and given the gratuity instruction over the defendant's objection.

intent in connection with Count Four. (Tr. 469-71). Under these circumstances, Douglass clearly hoped to obtain an acquittal, rather than a compromise verdict of guilty on a charge of accepting an unlawful gratuity. Having made that strategic decision, Douglass should not now be heard to complain about his own mistaken judgment concerning the strength of the Government's case against him.

POINT III

There was no prejudicial variance between the Indictment and proof as to Count Five.

Douglass contends he was deprived of a fair trial because Count Five of the indictment alleged that the bribe charged therein occurred "[i]n or around December, 1974", whereas the proof at trial showed that the bribe was paid during the first week of January, 1975. This argument is frivolous.

In Count Five Douglass was charged with accepting a \$50 bribe from LaFroscia "[i]n and around December 1974." According to LaFroscia's testimony, he gave Douglass the bribe in January 1975, "Some time right after the New Year's holidays," within the "first week" thereafter. (Tr. 123-24).

The first week of January 1975 certainly is within the approximate time described by the phrase "in and around December 1974", and accordingly there was no variance. See *United States v. Antonelli*, 439 F.2d 1068, 1070 (1st Cir. 1971); *United States v. Kerr*, 439 F.2d 689, 690 (9th Cir. 1971); *United States v. Edelman*, 414 F.2d 539, 542 (2d Cir. 1969), cert. denied, 396 U.S. 1053 (1970); *Kokotan v. United States*, 408 F.2d 1134, 1138 (10th Cir. 1969).

Furthermore, even if it could be argued that there was a variance, Douglass has utterly failed to demonstrate that he suffered any resulting prejudice—a deficiency which fully disposes of his claim. See *United States v. Antonelli, supra*, 439 F.2d at 1070; *United States v. Edelman, supra*, 414 F.2d at 542. See also *United States v. Chestnut*, Dkt. No. 75-1268, slip op. at 2439, 2446 (2d Cir., March 8, 1976). Moreover, this failure to allege any specific prejudice is not surprising, since this was not a case in which this claimed difference concerning the date charged and the date proved could have given rise to any credible defense, such as an alibi. It was undisputed that LaFroscia was an inmate at the halfway house and that Douglass was a corrections counselor during this time period. There was also no question that LaFroscia and Douglass were in contact during December, 1974 and January 1975.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York)

LAWRENCE IASON being duly sworn
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

Stating also that on the 7th day of June 1976
he served a copy of the within Brief for the
United States of America
by placing the same in a properly postpaid franked envelope
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And deponent further says that he sealed the said envelope
and placed the same in the mailbox for mailing at the
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Lawrence Iason
LAWRENCE IASON

Sworn to before me this

7th day of June 1976

JEANETTE ANN GRAYEB
Notary Public, State of New York
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Qualified in Kings County
Commission Expires March 34, 1977